ALLIED CAPITAL SDN BHD

v.

MOHAMED LATIFF SHAH MOHD & ANOTHER APPLICATION

FEDERAL COURT, KUALA LUMPUR
STEVE SHIM CJ (SABAH & SARAWAK)
SITI NORMA YAAKOB FCJ
MOHTAR ABDULLAH FCJ
[APPLICATION NOS: 08-32-1996(W) & 08-34-1996(W)]
12 APRIL 2001

CIVIL PROCEDURE: *Appeal - Appeal to Federal Court - Leave to appeal - Whether any questions of general principle upon which Federal Court has not previously decided - Whether any questions of importance upon which further argument and a decision of Federal Court would be to public advantage - Concurrent findings on primary issues by High Court and Court of Appeal - Likelihood of Federal Court disturbing such findings - Whether applicants would prima facie succeed in appeal if leave granted - Courts of Judicature Act 1964, s. 96*

CIVIL PROCEDURE: *Judge - Disqualification - Bias - Test for bias - Correct test to be adopted - Whether there was 'real danger of bias' - Disclosure of interests by judge - Objection from litigants*

CONSTITUTIONAL LAW: *Judges - Disqualification - Bias - Test for bias - Correct test to be adopted - Whether there was 'real danger of bias' - Disclosure of interests by judge - Objection from litigants*

The instant applications to the Federal Court under s. 96 Courts of Judicature Act 1964 was for leave to appeal against the decision of the Court of Appeal affirming the decision of the High Court given in favour of the respondents. The applicants herein raised the issue of bias on the part of the presiding lord justice of appeal ('the JCA') who delivered the judgment of the Court of Appeal. It was alleged that the JCA was a member of the Raintree Club of Kuala Lumpur ('the Club') which was the axis of the dispute between all the parties in the present case, and that the JCA had once acted as solicitor for one of the applicants herein on the very matters in issue in the present case.

Held:
Per Mohtar Abdullah FCJ

[1] The judgment of the Court of Appeal did not involve any questions of general principle upon which the Federal Court had not previously decided, or any questions of importance upon which further argument and a decision of the Federal Court would be to public advantage. The concurrent findings on primary issues and the resulting decisions of both the High Court and the Court of Appeal involved the application of well-established principles of law to the particular facts of the present case. It was highly unlikely that the Federal Court would disturb the concurrent findings and decisions of the courts below and, therefore, even if leave were granted the applicants would *prima facie* not succeed in the appeal.

[2] The JCA had, before the commencement of the hearing of the appeal, revealed his interests in the present case by informing counsels for both parties that he was indeed a member of the Club. The JCA had also disclosed, upon confirmation from his former law firm, that he had **not** acted for any of the parties in the present case, contrary to his earlier supposition that he had. There were no objections from counsel of either parties before or during the hearing of the appeal.

[3] Having expressed their confidence in the JCA to hear the appeal, and having participated in the proceedings without any reservations, the applicants could not now raise the issue of bias on the part of the JCA. It was in the interests of justice that counsels for the applicants raised their objection at the earliest possible opportunity. There was no reason to doubt the JCA's impartiality and integrity as a judge in hearing the appeal. Applying the 'real danger of bias test', the applicants' objection was without merit.

Per curiam:

[1] The principles of law on bias and the disqualification of judges from hearing cases are so basic and entrenched in our judicial psyche that any aberration from the norms of ethical behaviour would be frowned upon.

[Applications for leave dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Permohonan semasa kepada Mahkamah Persekutuan di bawah s. 96 Akta Mahkamah Kehakiman 1964 adalah untuk mendapatkan kebenaran bagi merayu terhadap keputusan Mahkamah Rayuan yang mengesahkan keputusan Mahkamah Tinggi yang diberikan memihak kepada responden-responden. Pemohon-pemohon di sini telah membangkitkan isu menyebelahi satu pihak oleh hakim rayuan yang bersidang ('HMR') yang telah menyampaikan penghakiman Mahkamah Rayuan. Adalah didakwa bahawa HMR tersebut merupakan seorang ahli Raintree Club Kuala Lumpur ('Kelab tersebut') yang mana merupakan paksi pertikaian antara kesemua pihak dalam kes semasa, dan bahawa HMR tersebut pernah pada suatu masa bertindak sebagai peguamcara untuk salah satu daripada pemohon-pemohon di sini mengenai perkara sama yang menjadi isu dalam kes semasa ini.

Diputuskan:
Oleh Mohtar Abdullah HMP

[1] Penghakiman Mahkamah Rayuan tidak melibatkan sebarang soalan prinsip am di atas yang mana Mahkamah Persekutuan masih belum dahulunya putuskan, atau sebarang persoalan yang penting di atas yang mana hujahan seterusnya dan keputusan Mahkamah Persekutuan mendatangkan manfaat pada orang awam. Keputusan sejajar atas isu-isu utama dan keputusan-keputusan yang dicapai oleh kedua-duanya Mahkamah Tinggi dan Mahkamah Rayuan melibatkan pemakaian prinsip-prinsip undang-undang kepada fakta-fakta khas kes semasa ini. Ianya besar kemungkinan bahawa Mahkamah Persekutuan tidak akan mengganggu keputusan sejajar tersebut dan keputusan mahkamah-mahkamah di bawah dan, oleh itu, meskipun jika kebenaran diberikan pemohon-pemohon akan menurut *prima facie* tidak berjaya dalam rayuan tersebut.

[2] HMR tersebut telah, sebelum permulaan perbicaraan rayuan, mendedahkan kepentingan beliau di dalam kes semasa dengan memaklumkan peguam bagi kedua-dua pihak bahawa beliau adalah sesungguhnya seorang ahli Kelab tersebut. HMR tersebut telah juga mendedahkan, atas pengesahan bekas lama syarikat guaman beliau, bahawa beliau telah **tidak** bertindak bagi mana-mana satu pihak dalam kes semasa ini, bertentangan dengan tanggapan beliau yang lebih awal bahawa beliau telah pun melakukannya. Tidak terdapat bantahan daripada peguam mana-mana satu pihak sebelum atau ketika perbicaraan rayuan tersebut.

[3] Setelah menyatakan menyakinkan mereka dalam HMR tersebut untuk mendengar rayuan itu, dan setelah menyertai di dalam prosiding tersebut tanpa sebarang keraguan, pemohon-pemohon kini tidak boleh membangkitkan isu memihak ke sesuatu pihak oleh HMR tersebut. Ianya demi kepentingan keadilan bahawa peguam-peguam bagi pihak pemohon telah membangkitkan bantahan mereka ketika peluang yang seawal mungkin. Tidak terdapat sebarang alasan untuk meragui sifat menyebelahi oleh HMR dan kejujuran beliau sebagai seorang hakim dalam perbicaraaan rayuan tersebut. Memakai "real danger of bias test", bantahan pemohon-pemohon tersebut adalah tidak bermerit.

Per curiam:

[1] Prinsip undang-undang atas perkara menyebelahi sesuatu pihak dan ketidak layakkan hakim daripada perbicaraan kes-kes adalah terlalu asas dan terbenam dalam sifat kehakiman kami bahawa sebarang penyimpangan daripada perkara biasa bagi etika kelakuan akan dikecam.

[Permohonan-permohonan untuk kebenaran di tolak.]

Case(s) referred to:

Datuk Syed Kechik Syed Mohamed v. The Board of Trustees of the Sabah Foundation [1999] 1 CLJ 325 ***(refd)***

Hock Hua Bank (Sabah) Bhd v. Yong Liak Thin [1995] 2 CLJ 900 ***(refd)***

Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan [1999] 3 CLJ 65 ***(foll)***

R v. Gough [1993] AC 646 ***(foll)***

Regina v. Bow Street Metropolitan Stipendiary Magistrate & Ors, ex p Pinochet Ugarte (No 2) [1999] 2 WLR 272 ***(dist)***

Legislation referred to:

Anti-Corruption Act 1997, s. 15(1), (2)

Courts of Judicature Act 1964, s. 96

Federal Constitution, art. 125(3A)

Judges Code of Ethics 1994, para 3(1)(a), (b), (c)

Other source(s) referred to:

Judicial Ethics in Australia, Hon. Justice Thomas Am, 1997, 2nd edn, p 52

Application No: 08-32-1996(W)

For the applicant - RR Sethu (Jaya Ramachandran with him); M/s Balendran Chong & Bodi

For the respondent - Raja Aziz Addruse (Benjamin Yean, Liza Chan with him); M/s Liza Chan & Co

Application No: 08-34-1996(W)

For the applicants - Cecil Abraham (Rabindra S Nathan, Rishwant Singh with him); M/s Shearn Delamore & Co

For the respondents - YM Raja Aziz Addruse (Benjamin Yean, Liza Chan with him); M/s Liza Chan & Co

Reported by Gan Peng Chiang

JUDGMENT

Mohtar Abdullah FCJ:

On 21 May 1996 Dato' Gopal Sri Ram JCA delivered the judgment of the Court of Appeal (reported in [1997] 2 CLJ 607) in respect of the disputes concerning The Raintree Club of Kuala Lumpur ("the Club"), affirming the decision of Dato' Dr. Zakaria M. Yatim J (as he then was) in the High Court, with slight variation as to costs.

Allied Capital Sdn. Bhd. ("Allied") (the applicant in 08-32-96(W) and Tengku Abdullah ibni Sultan Abu Bakar and 8 others ("the promoters") (the applicants in 08-34-96(W)) now apply to the Federal Court for leave to appeal against the whole of the said decision of the Court of Appeal pursuant to s. 96 of the Courts of Judicature Act 1964.

As clearly restated by Tan Sri Edgar Joseph Jr. FCJ in *Datuk Syed Kechik bin Syed Mohamed v. The Board of Trustees of the Sabah Foundation* [1999] 1 CLJ 325, at p. 330:

> It is not the practice of this court, nor as we understand it, the practice of the House of Lords, when sitting in its judicial capacity hearing application for leave to appeal, to give explicit reasons for granting or refusing leave, save in circumstances where their Lordships considered that they had no jurisdiction to entertain the application.

We would similarly adopt the same time-honoured practice by briefly noting that we have heard the submissions by Dato' R.R. Sethu and Mr. Cecil Abraham on behalf of Allied and the promoters respectively and also the reply by YM Raja Aziz Addruse on behalf of the respondents. We are satisfied that the High Court and the Court of Appeal had made concurrent findings on primary issues such as whether the promoters of the Club stood in a fiduciary capacity to the Club; whether, as fiduciaries, they had acted in breach of their fiduciary duties; whether there was any injury resulting from such breach of fiduciary duties, and if so, whether the proper relief was asked for and given. There is also the issue whether the respondents, as members of the Club, had the standing to bring the action on behalf of

the other members of the Club (other than the promoters) in a representative capacity. We are satisfied that the judgment of the Court of Appeal has not raised any question of general principle which the Federal Court has not previously decided or any question of importance upon which further argument and a decision of the Federal Court would be to public advantage. The concurrent decisions of the High Court and the Court of Appeal on the said issues are in fact mere applications of well-established principles of law to the particular facts of the case. In such a situation, it would be highly unlikely that an appellate court would disturb such concurrent decisions. We are, therefore, equally satisfied that, even if leave is given, the applicants would *prima facie* not succeed in the appeal.

Our decision, as above, would ordinarily have disposed of these applications under s. 96 of the Courts of Judicature Act 1964. However, the matter does not end there. Allied has in fact raised as its first primary point the issue of bias on the part of the learned judge who presided in the Court of Appeal and delivered its judgment as abovesaid. The objection is founded on two grounds, firstly, the learned judge's membership of the Club and secondly, the allegation that he had acted professionally for Allied on the very matters in issue in this suit. In view of the serious implications in law arising out of this objection, we are now compelled to deal with this issue at length.

One Yusof bin Abu Bakar, a director of Allied, in his affidavit affirmed on 18 November 1996 avered as follows:

> 9. The Appellant/Applicant does not question the integrity and ability of Yang Arif Dato' Justice Gopal Sri Ram as a judge of the Court of Appeal. However, I believe that the rules of natural justice are so fundamental that the decision intended to be appealed against ought to be set aside irrespective of the merits and I also believe that the appeal against the decision of the High Court dated 6th February 1995 be remitted to and heard *de novo* by another panel of the Court of Appeal.

The allegations raised clearly show how seriously Allied now complains about the conduct of the learned judge after judgment was delivered not in its favour. We wonder whether the same objection would have been raised if Allied had won its case. We agree that the issues raised affect a very fundamental aspect of the administration of justice and public confidence in the system of justice. The principles of law on bias and disqualification of judges from hearing a case are so basic and entrenched in our judicial psyche that any aberration from the norms of ethical behaviour would be frowned upon.

A study of authorities on apparent bias in the UK clearly shows conflicting opinions as to the correct test to be applied – whether it's the 'reasonable suspicion' of bias test or the 'real likelihood' of bias test, or, after the decision in *R v. Gough* [1993] AC 646, the 'real danger' of bias test. In *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 CLJ 65, at p. 129, Edgar Joseph Jr. FCJ, delivering judgment on behalf of the Federal Court summed up the stand of the Federal Court:

> The 'real danger' test favoured in *Gough* could be seen as a compromise between the 'reasonable suspicion' of bias test and the 'real likelihood' of bias test so as to stress that the Court is contemplating a lower standard than 'likelihood' or 'probability of bias', that is to say, a 'real possibility of bias': see *Gough* at pp. 668 C-D, 670 E-F, per Lord Goff; p. 671 B-C per Lord Woolf.
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> It is also important to note that the question of bias has to be answered by considering all the facts not merely by reference to the view of the hypothetical reasonable man (*R v. Gough*, per Lord Goff, at p. 670D-E).
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> Having given careful consideration to the matter, we prefer the test of apparent bias given in *Gough* ('the real danger of bias' test) as this will avoid setting aside of judgment upon some insubstantial grounds and the flimsiest pretexts of bias.

Regina v. Bow Street Metropolitan Stipendiary Magistrate and Others, Ex parte Pinochet Ugarte (No. 2) [1999] 2 WLR 272 ("the *Pinochet*'s case") also discussed the aforesaid tests. In that case, the House of Lords set aside its earlier decision when it was disclosed after delivery of judgment in the earlier appeal that Lord Hoffman, one of the members of the Appellate Committee who heard the appeal, had some link with Amnesty International, an intervener in the appeal, in that he was an unpaid director of the Amnesty International Charity Ltd. ("AICL"), a charity which was wholly controlled by Amnesty International. It was held that the relationship between Lord Hoffmann and Amnesty International through his directorship in AICL, led to the automatic disqualification of Lord Hoffmann from sitting on the hearing of the said appeal without the need to investigate whether there was a likelihood or suspicion of bias in the circumstances of that case.

It must be remembered, though, that in the *Pinochet*'s case Lord Hoffmann had never declared his interest or link to a party in that appeal. He continued to sit until judgment was delivered, by a majority of three to two (Lord Hoffmann being a member of the majority) that Pinochet was not entitled to immunity. Needless to say, this decision was in favour of

Amnesty International and other parties allied to its cause. It was later rumoured that Lord Hoffmann's wife was connected with Amnesty International in some way and subsequently a man anonymously telephoned Pinochet's solicitors alleging that Lord Hoffmann was a director of the AICL. That allegation was repeated in a newspaper report, and to cut a long story short, Pinochet subsequently lodged a petition praying that the earlier decision of the House of Lords should either be set aside completely or the opinion of Lord Hoffmann should be declared to be of no effect. The sole ground relied upon was that the links between Lord Hoffmann and Amnesty International were such as to give the appearance that he might have been biased against Pinochet.

The facts in our present case are entirely different. At the earliest possible opportunity before the commencement of the hearing of the appeal, the learned judge had seen counsels in chambers in the presence of his brother judges who were empanelled to hear the appeal. The learned judge had in fact disclosed his interest in the case by informing counsels that he was a member of the Club. He had specifically inquired whether any one of the counsels present had any objection to him being a member of the panel hearing the appeal. No one, not even counsel for Allied, raised any objection. Pursuant to a query raised by Mr. Abraham, counsel for the promoters, the learned judge disclosed that when he was a member of the Bar, he had acted in a brief which he originally thought was connected with the subject matter of the appeal. He had checked with his former office and was informed that he had not acted for any of the parties in the appeal, that his client was the Ayala Group from the Phillippines and that the brief involved a subject which was unconnected with the subject matter of the appeal. That was what the learned judge was informed by his former office. That was the position he believed himself to be in ie, that he was a member of the Club, that he had not acted for any of the parties and that the subject matter of that brief was unconnected with the subject matter of the appeal to be heard by him. He had accordingly made full disclosure of these facts to counsels. In the absence of any objections from counsels present, the learned judge had genuinely believed that he could continue to sit as a member of the coram hearing the appeal. The records do not show any advice or opinion to the contrary by the other two learned judges present. Obviously all three judges and all parties concerned were satisfied that the interest of justice would not be compromised in the circumstances of that case. The Court of Appeal then sat from 5 to 9 February 1996, hearing submissions by counsels. No objection was raised in the course of the proceedings as to the propriety of the learned judge hearing the appeal. If Allied, its directors or counsels

had any misgivings as to the position of the learned judge, they had ample time to cross-check with their officers or solicitors, past or present. Counsel for Allied could have asked for time to look into the matter if he or his client had any apprehension or misgiving in the matter. To support their allegation on the second ground, Allied produced an affidavit affirmed on 4 October 1996 by Junaidah bt. Mohd Said, a solicitor acting for Allied in 1984 in connection with the project for the setting up of the Club. She alleged that the learned judge had in fact acted for Allied and had given legal advice on a matter in issue in the said appeal. It is in the interest of justice that counsel should raise objection at the earliest possible opportunity upon disclosure by the judge. If Allied's objection is really genuine, it would have left no stones unturned to trace Junaidah or checked its records in time to raise the objection before the commencement of or during the proceedings in the Court of Appeal. Having expressed its confidence in the learned judge to continue hearing the case, by its participation in the appeal without any reservation, Allied cannot now raise this objection as a ruse to set aside "irrespective of the merits" an otherwise perfect judgment. We agree with the respondents that Allied's attempt to raise this objection "smacks of an afterthought."

In his book *"Judicial Ethics in Australia"* (1997, 2nd edn) the Hon. Justice Thomas Am, in his discussion of bias and prejudice as examples of misconduct in office, states, at p. 52:

> In general it is unethical for a judge to adjudicate a case whilst actually biased in favour of a party or knowingly having an interest in the result. However an erroneous decision by a judge as to whether there exists a real possibility of appearance of bias does not necessarily raise an ethical question, provided that the problem is disclosed to the parties. It would generally be unethical to fail to disclose to the parties a matter that may be of concern to one of them, so that the question of disqualification could be fairly considered.

And at p. 53, he states further:

> There is no doubt that in a situation where there is any reason to think that a relationship exists between the judge and a party or a party's lawyer, the judge and the lawyer each has the duty either to retire from the case or to disclose the relationship to the parties so that the question of disqualification can be considered.
>
> Once the problem has been fairly disclosed to the parties, it is not unethical to make an honest error in a conclusion concerning the appearance of bias especially if such a conclusion is one upon which minds can reasonably differ.

In Malaysia, pursuant to cl. (3A) of art. 125 of the Federal Constitution, the Yang di-Pertuan Agong has prescribed the Judges Code of Ethics 1994 to govern the judicial conduct of judges. The breach of any provision of the Code may constitute a ground for the removal of the judge from office. Paragraph 3(1)(a), (b) and (c) is relevant to our discussion. It provides:

> 3(1) A judge shall not:
>
> (a) subordinate his judicial duties to his private interests;
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> (b) conduct himself in such manner as is likely to bring his private interests into conflict with his judicial duties;
>
> (c) conduct himself in any manner likely to cause a reasonable suspicion that:
>
> (i) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or
>
> (ii) he has used his judicial position for his personal advantage ...

Under the Anti-Corruption Act 1997, the definition of "officer of a public body" includes "a judge of the High Court, Court of Appeal or Federal Court." Under sub-s. (1) of s. 15, any officer of a public body, which includes a judge, who uses his office or position for any gratification shall be guilty of an offence. Subsection (2) provides:

> (2) For the purpose of subsection (1), an officer of a public body shall be presumed, until the contrary is proved, to use his office or position for gratification when he makes any decision, or takes any action, in relation to any matter in which such officer, or any relative or associate of his, has an interest, whether directly or indirectly.

In view of the provisions of the Judges Code of Ethics 1994 and the Anti-Corruption Act 1997 on conflict of interests, it is indeed a very serious matter to raise against a judge that he is biased or has a personal interest, financial or otherwise, in any case he is hearing or in any decision he makes in his judicial capacity. If the allegation is true, then not only would his judgment or decision be vitiated, but disciplinary or criminal proceedings may be instituted against the errant judge. However, if the allegation is unfounded, there would be an unwarranted aspersion cast on the integrity of the judge even if the complainant categorically states that he does not question the integrity of the judge in raising such objection or allegation. It is unfortunate that the learned judge now falls victim to his own observation in *Hock Hua Bank (Sabah) Bhd. v. Yong Liak Thin* [1995] 2 CLJ 900, at p. 904:

> I notice an unhealthy trend of late to allege bias too readily against a judicial arbiter on insufficient material. Nothing is more capable of eroding public confidence in the judicial arm of the state than unwarranted and unfounded allegation of bias. It is therefore to be avoided at all costs, if necessary, by having resort to the power to punish for contempt.

To the credit of Dato' R.R. Sethu, he has raised the issue in a gracious manner with proper respect and due deference to the learned judge in question. However, we do not find any reason to doubt Dato' Gopal Sri Ram's impartiality and integrity as a judge in this case. His candour in disclosing his interest is laudable, his conduct of the case is unblemished, and the judgment he delivered on behalf of the Court of Appeal clearly shows that he has applied his mind properly and impartially to the issues in this case. Applying the 'real danger of bias' test, we are satisfied that the objection by Allied is without merit. We accordingly find that Allied's application for leave to appeal based on this issue of bias also fail. In the circumstances, therefore both applications by Allied and the promoters for leave to appeal to this court under s. 96 of the Courts of Judicature Act 1964 are hereby dismissed with costs. Deposits to be paid out to the respective respondents to account of their taxed costs.